Filed 9/12/19 P. v. Pearson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CORY JOE PEARSON, Defendant and Appellant.	F077582 (Super. Ct. No. BF167900A) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. John S. Somers, Judge.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen Acting P. J., Franson, J. and DeSantos, J.

Appellant Cory Joe Pearson pled no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2))[1] and he admitted a personal use of a firearm enhancement (§ 12022.5, subd. (a)), two prior prison term enhancements (§ 667.5, subd. (b)) and an allegation that he had a prior conviction within the meaning of the "Three Strikes" law (§ 667, subds. (b)–(i)). On appeal, Pearson contends the court abused its discretion when it denied his motion to withdraw his plea. We affirm.

FACTS[2]

On March 21, 2017, after arguing with his girlfriend M.A. at a park in Kern County, Pearson shot her in the leg with a handgun.

On March 26, 2017, Pearson was riding a stolen motorcycle when Kern County Sheriff's deputies attempted to stop him, but he managed to elude them after leading them on a pursuit that reached speeds of 100 miles per hour.

On April 4, 2017, Pearson followed a vehicle in which M.A. was a passenger and fired a shot through the front windshield causing the driver to crash. M.A. tried to flee but Pearson was able to get her into his vehicle and drive her to a motel where he was eventually arrested.

On November 7, 2017, the Kern County District Attorney filed an information that charged Pearson with eight counts, several enhancements and the prior strike allegation.

On January 25, 2018, while represented by appointed counsel Fred Gagliardini, Pearson entered his plea as noted above pursuant to a plea bargain that provided he would receive a stipulated, aggregate sentence of 20 years. Prior to entering his plea, Pearson signed a change of plea form. On the form, he initialed a sentence that stated he was entering his plea "freely and voluntarily, *without fear or threat to* [*him*] *or anyone closely*

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1 All further statutory references are to the Penal Code.

2 The facts underlying Pearson's offenses are abbreviated because Pearson only raises an issue regarding the change of plea proceedings.

related to [*him*]." (Italics added.) He also initialed a sentence that stated, "I hereby freely and voluntarily plead … No Contest to the charge(s) listed above." During the change of plea proceedings, when the court asked Pearson if anyone had threatened him in any way or promised him anything other than what was said in court, Pearson responded, "Nope."

On February 26, 2018, the court allowed Pearson to substitute retained counsel for appointed counsel.

On April 23, 2018, retained counsel, Nichole Verville, filed a motion to withdraw plea on Pearson's behalf, alleging Pearson entered his plea under extreme duress for several reasons, including that Gagliardini threatened members of Pearson's family and misadvised him regarding his maximum potential sentence (MPS). In a supporting declaration, Pearson stated Gagliardini knew M.A. had been contacting members of his family, telling them Pearson had not done anything, and that Gagliardini encouraged his mother and other family members to stay in communication with her. The day he entered his plea, Gagliardini told Pearson his MPS was 81 years and that if Pearson did not accept the plea deal he would never get out of prison and his mother, and possibly other family members, would be arrested on felony charges for communicating with M.A. When Pearson asked Gagliardini why his mother's communication with M.A. was suddenly a problem, he responded by asking Pearson if he wanted to get out of prison someday and if he wanted his mother to go to jail. Gagliardini also went into the hallway outside the courtroom and asked Pearson's mother and wife to write letters to Pearson encouraging him to take the deal. During the change of plea proceedings, Pearson did not say anything when the court asked if he had been threatened or promised anything

because he was terrified by the threat to arrest his mother and possibly other family members.[3]

On May 24, 2018, at a hearing on the motion to withdraw plea, Pearson's mother testified that the day Pearson entered his plea, Gagliardini told her outside the courtroom that if Pearson did not take a plea deal, she was going to jail. During cross-examination she added that Gagliardini told her she would be arrested for witness intimidation and that by the time she got "through court," Pearson would also be charged with that offense. Pearson's mother admitted she continued to contact M.A. after Pearson was arrested for shooting her. However, she was unaware of a protective order prohibiting Pearson and anyone on his behalf from contacting M.A. because she was in Idaho when Pearson was arrested. Pearson's mother was in court when Pearson entered his plea, but she did not tell the bailiff or anyone from the district attorney's office that Gagliardini had threatened her.

After Verville submitted Pearson's declaration into evidence, the prosecutor cross-examined Pearson.[4] Pearson testified he was aware he could not have any contact with M.A. or direct anyone else to contact her. He was also aware his mother was contacting her. Pearson did not tell the court he had been threatened because he believed if he did, his mother would go to jail.

On redirect examination, Pearson added that he did not tell the court he had been threatened because Gagliardini told him various family members would go to jail and he did not want his mother or wife to go to jail.

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[3] Pearson did not contend, in the moving papers or his declaration, that he would not have taken the plea offer if he had been advised that his MPS was substantially lower than 81 years.

[4] The court also took judicial notice of the transcript of the entry of plea proceeding and the plea waiver form.

Gagliardini was called as a witness by the prosecutor and testified that he did not threaten Pearson's mother or wife. Instead, Gagliardini told the family they could accept text messages and emails from M.A. and then they were to give them to him. However, they should not communicate with her about what her testimony should be or whether she should "take the Fifth" because that could be perceived as dissuading a witness and was a serious crime for which they could go to jail.

Gagliardini also denied threatening Pearson to get him to accept the plea offer. Instead, he explained to Pearson there was a lot of circumstantial evidence to convict him even without M.A.'s testimony. Gagliardini also told Pearson his MPS was approximately 83 years, [5] but he was being offered 20 or 22 years and he explained to Pearson the significance of the offer was that he would be released from prison at a much younger age.[6] After talking to him about his maximum exposure and the likelihood of conviction, Pearson appeared to understand to what he was pleading.

During argument, Verville stated that although Gagliardini testified he did not threaten Pearson's mother, Pearson and his mother testified he did. Verville also argued that she calculated Pearson's MPS was 50 years eight months if section 654 did not bar punishment on some of the counts, 44 years eight months if it did, and that both calculations were less than the MPS of 81 to 83 years Gagliardini told Pearson he faced. Thus, according to Verville, Pearson should have been allowed to withdraw his plea because he did not enter it knowingly, intelligently, or voluntarily.

The prosecutor calculated Pearson's MPS at 71 years. She argued Pearson had not met his burden of showing he did not enter his plea freely because the evidence was insufficient to show Gagliardini threatened Pearson, his mother or his wife and that due

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5 Verville introduced into evidence a copy of a typewritten document that Gagliardini gave to Pearson that showed Gagliardini calculated Pearson's MPS was 81 years.

6 Pearson was 35 years old when he entered his plea.

to his age and the MPS, Pearson could potentially have been incarcerated for the rest of his life.

The court denied the motion. With respect to the alleged threats, the court stated, in pertinent part:

> "[T]he evidence is, to me, clear that while it very well may be that Ms. Pearson understood what was said to her to be, essentially, a threat because people sometimes have a tendency to hear things in black and white, that is not what was conveyed to her and that is not what was conveyed to Mr. Pearson by Mr. Gagliardini. There is nothing constituting a threat that was conveyed as a threat to either of them with respect to the issue of her being potentially prosecuted for intimidating or intending to dissuade a witness. [¶] … [¶] It's clear to me, based on his own statements at the time of the plea colloquy, and based on the testimony presented in this hearing, that there was not a threat made which overbore Mr. Pearson's freewill and caused him to enter a plea of no contest to the charges when he otherwise would not have done so. So I don't find that to be a basis for the motion to withdraw the plea."

Additionally, the court calculated Pearson's MPS was 58 years. Because Pearson's personal use of a firearm enhancement converted his assault offense to a violent felony (§ 667.5, subd. (c)(8)), Pearson was limited to earning only 15 percent conduct credit (§ 2933.1). This resulted in Pearson having to serve 85 percent of his sentence, i.e., a maximum of 49.3 years (58 years x .85 = 49.3 years) based on the MPS the court calculated, 42.5 years (50 years x .85 = 42.5 years) based on the MPS Verville calculated, or only 17 years (20 years x .85 = 17 years) under the plea agreement. Since Pearson would serve a substantial amount of time based on the MPS calculated by the court or Verville, the court found Pearson would have entered his plea even if he had been told he would serve a net sentence of 17 years under the plea agreement versus a net sentence of 42.5 to 49.3 years if he did not accept the agreement.

The court also found that Pearson did not carry his burden of showing prejudice from the misadvisal because he did not assert in his declaration or testimony that

"Gagliardini's advisal or the difference between that and the lower calculations was the motivating factor for him entering his plea."

On May 30, 2018, in accord with the plea agreement, the court sentenced Pearson to an aggregate 20-year term: a doubled, aggravated term of eight years on his assault with a deadly weapon conviction in count 1, a 10-year firearm enhancement in that count, and two one-year prior prison term enhancements.

DISCUSSION

Pearson contends he entered his plea under duress because of Gagliardini's threats to his wife and mother and that he was denied the effective assistance of counsel in entering his plea because Gagliardini misadvised him that his MPS was 81 years. He further contends that even if his fear for his family alone was insufficient to establish good cause, combined with the misadvisement it was sufficient to overcome his will and to establish that his plea was not knowing, intelligent, and voluntary. We disagree.

"The general rule is that the burden of proof necessary to establish good cause in a motion to withdraw a guilty plea is by clear and convincing evidence. [Citation.]

'Withdrawal of a guilty plea is left to the sound discretion of the trial court. A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.' [Citations.]

"To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.] However, '[a] plea may not be withdrawn simply because the defendant has changed his mind.' " (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) " 'Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them.' " (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416.)

Pearson initialed a sentence on the change of plea form in which he acknowledged he was entering his plea without fear or threat to him or anyone closely related to him and a second statement through which he acknowledged he was entering his plea "freely and voluntarily." During the change of plea proceedings, when the court asked him if anyone had threatened him in any way, he replied that they had not. Further, Pearson and his mother each testified that they did not report the alleged threats to the court, the bailiff, or the prosecutor. Thus, the record supports the trial court's findings that Gagliardini did not threaten Pearson, his mother, or any other member of Pearson's family.

Moreover, as discussed below, the record also supports the court's finding that Pearson failed to show that the misadvisement of the MPS he faced "was the motivating factor" in Pearson entering his plea. Thus, we reject Pearson's contention that he entered his plea under duress.

Pearson Failed to Show he Received Ineffective Assistance of Counsel in Entering his Plea.

"It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea. [Citations.] In *Hill v. Lockhart*[] [(1985) 474 U.S. 52], the United States Supreme Court applied the criteria for assessing ineffective assistance of counsel, set forth in *Strickland v. Washington* (1984) 466 U.S. 668, to a claim of incompetent advice as to the decision whether to plead guilty. The court held that in order successfully to challenge a guilty plea on the ground of ineffective assistance of counsel, a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) Moreover, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,

which we expect will often be so, that course should be followed." (*Strickland v. Washington, supra,* 466 U.S. 668, 697.)

Pearson contends his MPS was only 50 years eight months and that Gagliardini misadvised him when he told him he faced a MPS of at least 81 years. However, even if Gagliardini's estimate of Pearson's MPS was off by approximately 30 years, Pearson did not allege, nor did he testify at the hearing, that he would not have entered his plea if he had been advised his MPS was only 50 years eight months. Thus, he failed to establish he was prejudiced by Gagliardini's misadvisement because he did not show that it affected his decision to enter a plea.

The moving papers for Pearson's motion to withdraw plea alleged Pearson entered his plea because of the threats to his family and the misadvisement of his MPS. They also alleged that the combination of threats and the misadvisement acted to overcome Pearson's free judgment. Additionally, in his declaration, Pearson stated that Gagliardini told him he would never get out of prison unless he took the deal and that he faced a MPS of 81 years and Pearson reiterated this in his testimony. Pearson suggests this shows he would not have entered a plea but for the misadvisement because "[t]his information would not have been included in his declaration or offered at the hearing on the motion if Gagliardini's misadvisement on the maximum exposure had not motivated appellant's entry of the plea." Pearson is wrong.

"An attorney's argument in pleadings is not evidence." (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283.) Additionally, Pearson could have had many reasons for wanting to withdraw his plea, including "buyer's remorse" and even if his MPS was only 50 years eight months as he contends, this still was a powerful inducement for him to enter a plea. (Cf. *People v. Johnson* (1995) 36 Cal.App.4th 1351, 1358 [court noted that a reduction in sentence from 38 years to 20, "under any circumstances would be a powerful inducement for defendant to plead"].) Thus, it does not follow from his statement in his declaration or in his

testimony that he was misadvised about his MPS that the misadvisement was what motivated him to enter his plea.

On September 19, 2017, Pearson waived time for the commencement of his preliminary hearing for an additional 15 days and he rejected a plea offer of 19 years. Pearson contends the only reasonable conclusion from his refusal to accept the earlier offer is that Gagliardini's misadvisement was what motivated him to enter a plea on January 25, 2018. However, there could have been many reasons for his failure to accept an earlier offer. Pearson may have wanted to test the prosecution's case, there may have been issues with witnesses that favored the defense, or a realistic assessment of the probability of conviction may have not yet set in. In any case, it does not follow solely from his earlier rejection of a plea offer of less than 20 years, that he would not have entered his plea if he had been properly advised of his MPS. Since Pearson failed to establish he was prejudiced by the misadvisement of his MPS, we reject his ineffective assistance of counsel claim and conclude that the court did not abuse its discretion when it denied Pearson's motion to withdraw plea.

DISPOSITION

The order is affirmed.